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IN

The Supreme Court of the United States

October Term, 1944

No. 65

THE UNITED STATES OF AMERICA, Petitioner

v.

WADDILL, HOLLAND & FLINN, INC., et al.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR WADDILL, HOLLAND & FLINN

J. P. TOWNES PTG. CO., DANVILLE, VA.

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Question Presented

Whether in a general deed of assignment proceeding the landlord, by the force and effect of the statutes creating his lien, is preferred as against a claim of the United States asserted under Section 3466 of the Revised Statutes.

Statutes Involved

Statutes of the State of Virginia, Sections 5519, 5522, 5523, 5524, 5527, 5528, 5783, 6518 and 6519 and Section 3466 of the Revised Statutes of the United States are set forth in the Appendix, infra, pp. 15-22.

Statement

The facts are substantially stated in the appellant's brief. There should be mentioned, however, that between the date of the execution of the deed of assignment, June 19, 1941, and the date of sale by the trustee, July 12, 1941, all the property conveyed in the deed of assignment remained on the demised premises and that the property distrained and attached by the landlord on July 1, 1941 was on said premises at that time.

Summary of Argument

The statutes of the State of Virginia give to the landlord a specific and perfected lien on the property of the tenant. These statutes for all practical purposes diminish the estate of the tenant to the extent of the rent lien. Distraint or attachment is not necessary to perfect the lien, but are methods of enforcement. The type of lien created by said statutes meets the test of priority as laid down by the United States Courts in determining whether the United States has precedence under Section 3466. The lien of the landlord as given by the Virginia Statutes is superior to the claim of the United States.

Argument

Introductory—The decision of the Court below is not in conflict with decisions of this Court. The specific question has not heretofore been decided, but where the Virginia statutes and similar ones have been construed by the United States Courts and by the Courts of Virginia and West Virginia there has been uniformity of opinion that the

statutes create in favor of the landlord a lien of a high and peculiar character, specific and unconditional, regardless of actual distraint. In Re Wynn, 30 Fed. Cas. 752, 762; **Lott v. Salsbury,** 237 F. (4th Cir) 191; **Bradford v. Graham,** 287 F (4th Cir) 686; **Anderson v. Henry,** 45 W. Va. 319, 31 S. E. 998; **Wades v. Figgatt,** 75 Va. 575; **In Re McIntire,** 142 Fed. 593; **Allen v. Parkey,** 154 Va. 739, 149 S. E. 615.

I

The provisions of the Virginia statutes create a lien for the landlord which is specific, perfected and unconditional and entitles the landlord to priority in payment over the claim of the United States.

Reference to the statutes will indicate the high character of the lien given to the landlord by such provisions as:

(A) If any other lien be created on the goods and chattels of the tenant while they are upon the leased premises or within 30 days thereafter, the landlord's lien takes precedence over such other lien for six months rent where premises are not used for agriculture. Section 5523—appendix pp. 16, 17.

(B) If, after the commencement of any tenancy, a lien be created on the goods and chattels of the tenant by deed of trust, mortgage or otherwise, the party having such lien may not remove the goods from the premises unless and until he pays the landlord so much of the rent as is in arrear and securing so much as is to become due, not to exceed in all six

month's rent where premises are not used for agriculture. Sec. 5524, appendix pp. 17, 18.

(C) If, after the commencement of any tenancy the goods on the premises leased are sold, the purchaser may not remove said goods unless and until he pays to the landlord so much of the rent as is in arrear and securing so much as is to become due, not to exceed in all six month's rent where premises are not used for agriculture. Sec. 5524, appendix pp. 17, 18.

(D) If, after the commencement of any tenancy the goods are taken under legal process the officer executing it shall, out of the proceeds of the goods, make such payment of rent as is in arrear and as to the rent to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers' bonds with good security, payable to the person so entitled and delivering such bonds to him. Sec. 5524, Appendix, pp. 17, 18.

(E) If the goods be not taken under legal process, the payment and security referred to in the preceding paragraph shall be made and given before their removal. Sec. 5524, Appendix pp. 17, 18.

The landlord is protected by the statute against all deeds of trust, mortgages and other liens, where the lien has been created after the commencement of the tenancy, upon goods on the leased premises, which belong to a person liable for rent. **Richmond v. Duesberry,** 27 Gratt. (68 Va.) 210. He must be paid before removal under such deed of trust, mortgage

or other lien, all rent in arrear and secured what has not fallen due not exceeding six month's rent where the premises are not used for agriculture. It gives the landlord right of payment and preference out of the goods themselves. It gives right to the landlord to detain the goods on his premises against a removal of trust until paid or secured as prescribed. If removed under legal process it says that the officer, though he may remove them, shall, out of the goods, pay rent in arrear, and sell enough on a secured credit to pay the balance when due. **Anderson v. Henry,** 45 W. Va. 319, 31 S. E. 998.

Speaking of the Virginia statute, Chief Justice Chase while sitting on appeal in the Circuit Court in the case of In Re Wynn 30 Fed. Cas. 752, 762, said, " . . . We cannot doubt that this statute creates a lien in favor of the landlord and lien of a high and peculiar character . . ."

In **Bradford v. Graham,** 287 F. 686 (4th Circuit) it was held that under the Virginia statute the landlord is given a preferred, specific and fixed lien, a lien that is unconditional and of a high order.

Likewise in **Lott v. Salsbury,** 237 F. 191 (4th Circuit) the Court held that the statutes of Virginia give the landlord a specific lien upon any goods upon the leased premises for rent, which is good against lien creditors for the period fixed in the statutes.

I. **Distraint and Attachment not necessary to perfect landlord's lien.**—It was the opinion of the Court in **Bradford v. Graham,** 287 F. 686 (4th Circuit) that distraint or attachment is not necessary to perfect

the lien. This statement is made by Circuit Judge Waddill, ". . . And it is equally clear that this lien is unconditional and of a high order, requiring the issuance of no process of distraint, or attachment to perfect the same . . . We think under the Virginia statute and decisions, that the landlord is given a preferred, specific and fixed lien for not exceeding one year's rent upon all of the goods and property upon the demised premises, and for which, when past due, distraint may be made at will; that such lien is subject to no limitation or qualification whatever, save taxes, etc."

Again referring to **Anderson v. Henry** 45 W. Va. 319, 31 S. E. 998, it was there held that under the West Virginia statutes, similar to those of Virginia, distraint was not necessary to perfect the lien. It was pointed out in that case that in at least one instance the statute apparently prohibits distraint or attachment where the goods are levied upon by an officer in executing a writ of fi fa or other legal process. To prevent a clash between process and distraint—a seizure out of the officer's hands by an officer under distress warrant subsequently issued, whether for rent due at the removal or afterwards becoming due—the statute allows the officer to remove the property from the premises under legal process, but requires him to pay the rent out of the sale of the goods.

In Re McIntire, 142 Fed. 593, followed and approved **Anderson v. Henry,** supra. In the McIntire case the Court construed the decision in **Anderson v. Henry** to mean that the landlord in West Virginia

has a lien on the tenant's goods carried on the premises over all liens by deed of trust, mortgage or otherwise, created after the tenant's term, whether distress therefor has issued or not.

The Circuit Court in reviewing the Virginia statutes **In Re Wynn,** 30 Fed. Cas. 752, 762, did not deem it necessary that there be distraint in order to vest or perfect the lien. It was there held that the lien of the landlord is given by statute independently of proceedings by distress warrant or attachment.

In **Allen v. Parkey,** 154 Va. 739, 149 S. E. 615, the Supreme Court of Appeals held that distraint was not necessary to vest the lien for rent.

II. **Landlord's lien is prior to other liens attaching after the tenancy.**—The specific provisions of the Virginia statute prohibit the removal of goods from leased premises by a party having a lien by way of deed of trust, mortgage or otherwise, until the rent is paid or secured as therein specified, if the lien accrued after the goods were placed on the premises.

III. **The lien of the landlord is superior to the claim of the United States.**—The United States has no lien upon the property of an insolvent debtor, but merely a right of priority in payment out of his estate in the hands of his assignee or other representative. It has been held that the lien of a landlord upon the property of the debtor is superior to the right of priority of the United States and of the surety on the bond of a debtor to the United States, the Court basing its decision on the ground that the lien of a mortgagee

or pledgee on the property of the debtor would not yield to the claim of the United States and that the legal lien of the landlord is not weaker than that of the mortgagee or pledgee. **Jackson v. Oddie**, 2 Mart. N. S. 555.

The holding of this Court in **Thelusson v. Smith**, 2 Wheat. 396 was that there would be an exception to the right of the United States to priority where the debtor had made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi fa, concluding that this would be such a divestiture out of the debtor as to preclude any claim of the United States. The lien of the landlord being superior to that of a mortgage created after the tenancy and superior to the lien of a fi fa it would appear that the landlord's lien would come ahead of the claim of the United States. It would be a strange rule which accorded priority to the deed of trust or mortgage creditor over the claim of the United States and yet denied it to the landlord when the deed of trust or mortgage creditor is by positive enactment postponed to the landlord's claim. Although a claim of the United States was not involved in the case of **In Re Wynn**, 30 Fed. Cas. 752, 762, Chief Justice Chase in referring to the type of lien given the landlord under the statutes of Virginia, said, ". . . Would it not be trifling with the plain sense of words to say there is a lien under the trust and a lien under the execution but the claim (rent) which by law is made superior to either is no lien."

II

Reply to the contention of the United States that the landlord's lien is insufficiently specific to prevail over the claim asserted by the United States.

It is the contention of the United States that the landlord's lien is not sufficiently specific to override the claim of the government. They argue that the state statutes do not divest the tenant of either title or possession; that the debt secured is not specific; that the goods subject to the lien are not specific; and that a court proceeding is necessary for enforcement of the lien.

It will be observed that none of the statutes considered in the cases of **United States v. Texas,** 314 U. S. 480; **New York v. Maclay,** 288 U. S. 290; **Spokane County v. United States,** 279 U. S. 80 and **United States v. Knott,** 298 U. S. 544 are even remotely similar to the statutes of Virginia relating to a landlord's lien for rent. In most of those cases the conflict was between federal and state or county governments as to the priority of tax claims.

I. **The estate and title of the tenant in his goods on leased premises is diminished to the extent of rent due or to become due.** Goods and chattels of the lessee on leased premises cannot be removed therefrom by a purchaser, mortgagee or the holder of any other lien acquired after the tenancy unless the rent due is paid and that to become due is secured, in all six month's rent where the premises are not used for agriculture. Nor can the goods be removed from the premises, except under legal process, without the rent being paid and secured as specified in the

statute. Section 3524, Appendix pp. 17, 18. Even if removed under legal process the rent must be paid and secured out of the goods by the officer. When the goods of the tenant are placed upon the premises they immediately become liable for the payment of rent. The landlord acquires a specific interest in the chattels and the title of the tenant is divested to that extent and likewise the estate of the tenant is for all practical purposes diminished to that extent. The lessee's equity in the goods is all that would be available to other creditors. The tenant cannot remove the goods without paying or securing the rent, neither can a purchaser or a lienholder acquiring lien after the tenancy. These provisions of the Virginia statute would appear to considerably disturb the title and possession of the tenant. In **Brent v. Washington,** 10 Pet. 596, 611, it was held that a claim of the United States against certain bank shares was inferior to that of the bank as against the stockholder of the bank who was indebted to it, because of a charter provision giving the bank a lien on its shares issued to a shareholder becoming indebted to it, on the theory that the bank could effectively prevent a transfer of its shares under such circumstances. This is somewhat similar to the instant case where the statute forbids the removal of goods until the rent is paid or secured.

II. **Is the amount of the rent claim specific?**—The lien of the landlord against the goods and chattels on the premises extends to cover six months rent, past due or to become due, where the premises are not used for purposes related to agriculture. Such tenancies are always based upon a stipulated rental,

usually payable monthly. The amount of any arreage in rent would of course be likely to change from month to month, but others, including the tenant, are charged with notice that the goods and chattels are subject to a lien for six month's rent and the exact amount thereof is easily ascertainable at any given time. A judicial proceeding is not necessary to determine the amount. Distraint is founded on a warrant issued by a justice upon affidavit by the landlord of the amount of rent due. The warrant is not served on the tenant. The officer makes a levy, advertises and sells the goods and returns the warrant to the Clerk's Office showing disposition of the proceeds of sale. The warrant is not docketed and no judicial determination of the amount of rent due is ever made, unless the tenant files affidavit of substantial defense denying that he owes the rent, as provided for in one of the statutes. Sections 5522, 5528, 6519, appendix pp. 16, 19, 21. The steps taken to enforce the landlord's lien are more or less summary, much more so than in proceedings to enforce a mortgage or a vendor's lien in Virginia. If a party holding a mortgage desires to have the property sold he must institute a suit in chancery and have a report of liens by a Commissioner in Chancery. The amount due on the mortgage must be proved before the Commissioner and decree must be entered setting forth the amount due on said mortgage. Likewise in case of a vendor's lien on property, the enforcement thereof requires a suit in chancery and procedure similar to that in a suit to foreclose a mortgage. In each instance the amount due on the secured debt must be proved before and ascertained by the Court. How-

ever, the amount of the landlord's lien is not left to determination by the Court. It is founded solely on the affidavit of the landlord. True, there is a provision that the tenant may file with the officer, when he comes to make the levy, an affidavit of substantial defense and thus bring on a hearing, but every lien is subject to being contested and the mere fact that there is a provision in the statutes to the effect that the tenant may protect himself if a landlord wrongfully distrains for rent should not vitiate the force and effect of the lien given to a landlord. As a practical matter it is seldom that a tenant can in good faith file an affidavit of substantial defense to the claim of the landlord. For the foregoing reasons it is submitted that the landlord's claim is sufficiently specific to override the claim of the United States.

III. Are the goods subject to the lien specific?—Section 5523 of the Virginia statutes, Appendix pp. 16, 17, provides that any of the goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days, are subject to levy under distress warrant. Therefore, all of such goods are subject to distraint, not a part thereof, but all such goods on the premises. Section 5524 of the Virginia statutes, Appendix pp. 17, 18, prohibits the removal of such goods by the tenant, a mortgagee or other lien holder acquiring a lien after the tenancy, and by a purchaser unless and until the rent due or to become due is paid or secured. It has been held that a lienholder removing goods from leased premises, without paying and securing the rent, is personally

liable for the value of the goods removed by him from the premises, to the extent of the rent due and owing the landlord, although the landlord had not distrained or attached the goods prior to their removal or within thirty days thereafter. **American Exch. Bank v. Goodlee**, etc. 135 Va. 204, 116 S. E. 505. It would, therefore, seem that the lien is sufficiently specific as to the property subject thereto.

IV. **To what extent is the assistance of the Courts necessary for the enforcement of the landlord's lien?** —It is not necessary to invoke the aid of a court of law or chancery, in the usual sense, in the enforcement of the lien of a landlord. The distress warrant issues as a matter of course from a justice upon the filing of affidavit by the landlord showing the amount of rent due. No process is issued on the warrant. It is directed only to the sheriff, sergeant or constable with direction to make the rent out of the goods on the leased premises. The warrant is not docketed or set for hearing. The officer returns the warrant to the Clerk's Office showing his action under the warrant and the Clerk preserves the warrant as in case of certain executions. If the tenant desires to contest the distraint, he may file with the levying officer an affidavit of valid defense, in which event there would be a hearing on the matter. This merely gives the tenant the right to protect himself against an unlawful claim and is not designed to interfere with the summary procedure followed in enforcing the lien of a bona fide claim for rent. The distress warrant is not returnable as a matter of course, in court, as indicated in the brief of appellant on page 20. Not unless the tenant gives affidavit that

he has a valid defense and hands the same to the levying officer is there any real judicial proceeding. Upon the giving of such affidavit the officer returns the warrant and affidavit to the first day of the next term of court and thereafter motion may be made for judgment.

Every lien requires some method of enforcement. The mortgage lien and the vendor's lien, both liens of high dignity, cannot be enforced without the aid of a court of chancery. The deed of trust lien which is commonly used, requires execution thereof by the trustee. If the trustee proceeds improperly or if the debtor has any valid defense to the debt or a part thereof he may invoke the aid of a court of equity.

It is submitted that the usual and normal method to enforcing the landlord's lien for rent does not in reality invoke the aid of a court and even if so it cannot be said to affect the lien insofar as it is specific and perfected.

Accordingly, we maintain that the landlord's lien here in question is specific and perfected and takes priority over the claim of the United States.

Conclusion

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

RUTLEDGE C. CLEMENT,
Attorney for
WADDILL, HOLLAND & FLINN, Inc.

October, 1944.

APPENDIX

Section 3466 of the Revised Statutes of the United States (31 U. S. C. 191) provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The Virginia Code of 1936 provides:

> § 5519. **Remedy for rent and for use and occupation.**—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefor be non-suited, but may use the same as evidence of the amount of his debt or damages. In any action for rent, or for such

use and occupation, interest shall be allowed as on other contracts. (Code 1887, § 2787.)

* * * * *

§5522. **When and by whom distress made.**—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. The distress shall be made by a constable, sheriff, or sergeant of the county or city wherein the premises yielding the rent, or some part thereof, may be, or the goods liable to distress, may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant for rent reserved upon contract from the person of whom it is claimed. (Code 1887, § 2790; 1902-3-4, p. 664.)

§ 5523. **On what goods levied.**—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be

liable to distress, but for not more than six months' rent if the premises are in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming, or agriculture, and for not more than twelve months' rent if the lands or premises are used for farming or agriculture whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section, nor shall the goods of the undertenant be liable to a greater amount than such undertenant owed the tenant at the time the distress was levied. (Code 1887, § 2791; 1922, p. 863; 1932, p. 696.)

§ 5524. **When goods not to be removed without paying six months' rent; lien for taxes, levies, and militia fines not affected.**—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the said goods be sold, the party having such lien, or the purchaser of such goods may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are

in a city or town, or in any subdivision of suburban and other lands divided into building lots for residential purposes, or of premises anywhere used for residential purposes, and not for farming or agriculture, and not being more altogether than twelve months' rent, if the lands or premises are used for farming or agriculture. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.

For the purpose of this act a monthly or weekly tenancy shall not be construed as a new lease for every month or week of occupation of the premises by the tenant, but his tenancy shall be considered as a continuance of his original lease so long as he shall continue to occupy the property without making any new written lease. (Code 1887, § 2792; 1922, p. 863; 1932, p. 696.)

§ 5527. **When distress not unlawful because of irregularity, etc.**—Where distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party

distraining, or his agent, the distress itself shall not be deemed to be unlawful, nor the party making it be therefore deemed a trespasser ab initio; but the party aggrieved by such irregularity or unlawful act may, by action, recover full satisfaction for the special damage he shall have sustained thereby. (Code 1887, § 2794.)

§ 5528. **Return of distress warrants; process of sale thereunder.**—It shall be the duty of each officer who, under the present law may execute warrants of distress, except where it is otherwise provided by law, to make return of his action and proceedings upon such warrants as may be placed in his hands for collection, and file the same with the clerk of the circuit or corporation court of his county or city, as the case may be, except in the city of Richmond the same shall be filed with the clerk of the circuit court, or the clerk of the law and equity court, or the clerk of the law and equity court, part two, within sixty days after the same may have come to his hands, upon the return of such warrant it shall be the duty of such clerk to enter the same upon the execution book of his office after the manner as now provided by law as to executions issued by justices and returned unsatisfied, and the said clerk shall preserve such warrant in his office as is now provided as to such unsatisfied executions. If such return shall show that a levy has been made and that property levied on remains unsold, it shall be lawful for the said clerk of the court in whose office such return is filed to issue a writ of venditioni

exponas thereon just as if the said return were upon a writ of fieri facias. (1897-8, p. 755; 1930, p. 456).

* * * * *

§ 5783. **For wrongful distress, etc.**—If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful seizure, and also, if the property be sold, for the sale thereof. (Code 1887, §2898.)

* * * * *

§ 6518. **When and how forthcoming bond may be taken; property then remains in debtor's possession.**—The sheriff or other officer levying a writ of fieri facias, or distress warrant, may take from the debtor a bond, with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon (including his fee for taking the bond, commissions, and other lawful charges, if any), with condition that the property shall be forthcoming at the day and place of sale; whereupon, such property may be permitted to remain in the possession and at the risk of the debtor. (Code 1887, § 3617.)

§ 6519. **How tenant unable to give forthcoming bond may have distress warrant returned to court and make defense thereto; when officer,**

in such case, to take possession of property levied on; its sale, when perishable or expensive to keep.—On affidavit by a tenant, whose property has been levied on under a warrant of distress, that he is unable to give the bond required in the preceding section, and that he has a valid defense under section sixty-five hundred and twenty-two, the officer levying the warrant shall permit the property to remain in the possession and at the risk of the tenant, and shall return the warrant, together with the affidavit, to the first day of the next term of the circuit court of his county or corporation court of his corporation, and thereupon the landlord after ten days' notice in writing to the tenant, may make a motion before such court for a judgment for the amount of the rent and for a sale of the property levied on, as aforesaid, to which motion the tenant may make such defense as he is authorized to make, under section sixty-five hundred and twenty-two, to an action or motion on the bond where one is given. If, however, after such affidavit is made, the claimant of the rent, or some one for him, shall give bond with sufficient surety, in a penalty double the value of the property levied on, with condition to pay all costs and damages which may accrue to any one by reason of his suing out said warrant, the officer shall take possession of the property and hold the same subject to the order of the court. If the property be perishable, or expensive to keep, the court, or the judge thereof in vacation, may order it to be sold, and on the final trial

of the cause, the court shall dispose of the property, or proceeds of sale, according to the rights of the parties. (Code 1887, § 3618; 1902-3-4, p. 839.)

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1944.

The United States of America, Petitioner, vs. Waddill, Holland & Flinn, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[January 2, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

The issue here is whether, in a state proceeding under a general assignment for benefit of creditors, Section 3466 of the Revised Statutes, 31 U. S. C. § 191, gives priority to a claim of the United States over a landlord's lien and a municipal tax lien.

Mrs. Oeland Rougan, the assignor, operated a restaurant in Danville, Virginia, on premises leased from respondent Waddill, Holland & Flinn, Inc. On June 19, 1941, she executed a general deed of assignment to a trustee for the benefit of creditors, specifically conveying all personal property, fixtures and equipment used by her in the conduct of the restaurant and located on the premises. This property remained on the premises until sold by the trustee on July 12, 1941. After deduction of appropriate administrative expenses, a sum of $1,407.29 remained. Four creditors claimed priority of payment from this amount.

(1) The United States claimed the sum of $1,559.63, plus interest, representing certain unpaid federal unemployment compensation taxes and a debt arising out of a Federal Housing Administration transaction.

(2) The Virginia Unemployment Compensation Commission made a tax claim of $66.38, plus interest. The Commission's claim, however, was conceded to be subordinate to that of the United States and need not be further considered here.

(3) The City of Danville claimed $30.55 as personal property taxes still unpaid. On July 2, 1941, the City Collector distrained on all of the property on the leased premises.

(4) The landlord, Waddill, Holland & Flinn, Inc., claimed $1,500.00 for six months' rent due and to become due. The as-

signor's lease from this firm run for five years beginning January 1, 1937, at a monthly rental of $250.00. On July 1, 1941, twelve days after the deed of assignment was executed, the firm obtained the issuance of a distress warrant for 3 2/5 months' past due rent, and an attachment for 2 3/5 months' future installments of rent. On the same day, the firm levied the warrant and attachment on the assignor's property located on the leased premises.

The trustee under the general assignment filed a petition in the Corporation Court of Danville, reciting the various claims and requesting advice as to the proper distribution. That court held that the landlord was entitled to priority in payment over the claims of the United States and the Virginia Unemployment Compensation Commission but that its claim was subordinate to that of the City of Danville for taxes in the sum of $222.31. On appeal by the United States, the Supreme Court of Appeals of Virginia affirmed this order of distribution. 182 Va. 351, 28 S. E. 2d 741. We granted certiorari because of the importance of the problems raised and because of asserted conflict with this Court's decisions in *New York* v. *Mackay*, 285 U. S. 290, and *United States* v. *Texas*, 314 U. S. 480.

Section 3466 of the Revised Statutes provides in pertinent part that "the debts due to the United States shall be first satisfied" whenever any person indebted to the United States is insolvent or, "not having sufficient property to pay all his debts, makes a voluntary assignment thereof." We hold that this statute clearly subordinates the claims of both the landlord and the municipality to that of the United States. The judgment of the court below must accordingly be reversed.

The words of Section 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. *Thelusson* v. *Smith*, 2 Wheat. 396, 425; *United States* v. *Texas*, *supra*, 484. But this Court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441, 442; *Beers* v. *Bank of Washington*, 10 Pet. 596, 611, 612; *Spokane County* v. *United States*, 279 U. S. 80, 95; *United States* v. *Kaw*, 298 U. S. 544, 551; *New York* v. *Mackay*, *supra*, 293, 294; *United*

States v. *Texas*, *supra*, 485, 486. It is within this suggested exception that the landlord and the municipality seek to bring themselves. Once again, however, we do not reach a decision as to whether such an exception is permissible for we do not believe that the asserted liens of the landlord and the municipality were sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States.

The landlord rests its claim upon certain provisions of the Virginia Code of 1936. Sections 5519 and 5523 authorize a landlord to levy distress for six months' rent upon "any goods of the lessee . . . found on the premises, or which may have been removed therefrom not more than thirty days. . . . for not more than six months' rent if the premises are in a city or town." Section 5524 provides that the goods of the tenant on leased premises in a city or town may not be removed by a lienor or purchaser, nor taken under legal process, save "on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due," not to exceed six months' rent. Other sections provide for officers making the distress under warrant from a justice, founded upon an affidavit of the person claiming the rent, and for such officers to make returns of their actions and proceedings upon such warrants. Provisions are also made for legal proceedings looking toward the possession and sale of the property to satisfy the debt.

The Supreme Court of Appeals of Virginia has here held that these sections "give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it." 182 Va. at 363, 28 S. E. 2d, at 746. It has also held that such a lien "relates back to the beginning of the tenancy." 182 Va. at 364, 28 S. E. 2d at 746, thus giving it force and effect on date of the voluntary assignment. These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to

examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supercede a long-standing Congressional declaration of priority. *Field* v. *United States*, 9 Pet. 182, 201; *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, *supra*, 90.

Tested by its legal effect under Virginia law, the landlord's lien in this instance appeared to serve "merely as a *caveat* of a more perfect lien to come." *New York* v. *Maclay*, *supra*, 294. As of the date of the voluntary assignment, it was neither specific nor perfected. It gave the landlord only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof.

Specificity was clearly lacking as to the lien on June 10, 1941, the date of the assignment. On that day it was still uncertain whether the landlord would ever assert and insist upon its statutory lien. Until that was done it was impossible to determine the particular six months' rent, or a proportion thereof, upon which the lien was based. The lien did not relate to any particular six months' rent but could attach only for the rent which might be due at or after the time when the lien was asserted. *Wades* v. *Eggart*, 75 Va. 579, 582. And if it were asserted at a time when the tenancy had terminated or would terminate within six months of the date to which rent had been fully paid, the lien could only cover less than six months' rent. Conceivably the amount of rent due or to become due was uncertain on the day of the assignment. The landlord may have been mistaken as to the rental rate or as to payments previously made and the tenant may have been entitled to a set-off. *See Allen* v. *Hart*, 18 Gratt. (59 Va.) 722, 737; *Hancock* v. *Whitehall, &c., Co.*, 100 Va. 443, 447. Moreover, while the lien legally attached to all such property as might be on the premises when the lien was asserted or within thirty days prior to distraint, the landlord could distrain goods only to the extent necessary to satisfy the rent justly believed to be due, the tenant possessing an action for damages for excessive distraint. Va. Code § 5783; *Fishburne* v. *Engeldove*, 91 Va. 548; *Garfein* v. *Howell*, 142 Va. 197. Thus until the extent of the lien was made known by the landlord and until some steps had been taken to distrain or attach sufficient property to satisfy the lien, it was impossible to specify the goods actually and properly subject to

the lien. Some of the goods on the premises may have been subject to mortgages or liens which attached before the goods were brought on the premises, in which case the landlord's lien would be inferior. Va. Code § 5523. And if other goods were removed after the date of the voluntary assignment but more than thirty days before the distraint or attachment, the right of distraint and attachment as to those goods would disappear. Va. Code § 5523; *Dime Deposit Bank* v. *Wescott*; 113 Va. 567. These factors compel the conclusion that neither the rent secured by the lien nor the property subject to the lien was sufficiently specific and ascertainable on the day of the voluntary assignment to fall within the terms of the suggested exception.

Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the mere existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actively asserted and an attachment or a distraint levied, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods severed themselves from the general and free assets of the tenant from which the claims of the United States were entitled to priority of payment. Prior to that time, the lien operated to do no more than prevent the removal of goods from the premises by certain classes of persons. Va. Code § 5524, and give the landlord priority in distribution under state law provided that the goods remained on the premises. Such a "potential, inchoate lien" could not disturb the clear command of Section 3466 of the Revised Statutes. Something more than a "*caveat* of a more perfect lien to come" was necessary.

The lien of the City of Danville stands in no better position insofar as the claim of the United States is concerned. The municipality contends that it assessed taxes on specific items of furniture and equipment pursuant to annual levies made by the city council and that a lien attached to such property on January 1, 1941, by operation of state law. It claims that this lien attached before the claim of the United States was acquired and hence had priority.

Under Virginia law, however, a municipal tax confers a lien on personal property which enables the city to follow it wherever it may be taken only if the assessment is specifically made on such property. *Drewry* v. *Baugh and Sons*, 150 Va. 394, 400, 401;